United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

No. 10,723

BRIEF FOR APPELLANT AND JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN DREDGING COMPANY,

Appellant

v.

Vice Admiral Edward L. Cochrane

MAJOR GENERAL PHILIP B. FLEMING, individually and as Chairman of the United States Maritime Commission, et al.

Appellees

Appeal from the United States District Court for the District of Columbia

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FILED SEP 6 - 1950

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No. 10,723

APPELLANT'S STATEMENT OF QUESTION PRESENTED

The question is whether a suit against the members of the Maritime Commission, individually and in their official capacities, alleging that Plaintiff is the owner from whom the United States Government acquired a vessel of 1,000 gross tons or less, that said vessel has been declared surplus, that Public Law 305, 78th Congress, 2nd Session, (T. 50 App. U. S. C. 1301f.) directs that such owner shall be notified that the vessel may be returned to him upon repayment of the compensation with adjustments, that such notice has not been given and the members of the Commission have failed and refused to give such notice in violation of their statutory duty to the irreparable harm of Plaintiff, is barred on the theory of sovereign immunity as a suit against the United States.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,723

AMERICAN DREDGING COMPANY,

Appellant,

v.

MAJOR GENERAL PHILIP B. FLEMING, individually and as Chairman of the United States Maritime Commission, et al,

Appellees

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal by plaintiff below from an order and final judgment entered by the District Court the 16th day of May, 1950 (App. 34), dismissing a complaint (App. 2) for an injunction and mandatory relief on the grounds that it was a suit against the United States. Notice of appeal was filed June 8, 1950 (App. 35).

The District Court had jurisdiction to issue an injunction and mandatory relief by virtue of the provisions of Title 11, D. C. Code, 1940 Edition, Section 315, and Title 28, U. S. C., Sec. 1331-f.

Jurisdiction in this Court is derived from Title 28, U. S. C., Sec. 1291-2.

STATEMENT OF THE CASE

The object of this suit was to compel the members of the United States Maritime Commission to comply with the specific provisions of Public 305, 78th Congress, Title 50 App. U. S. C., Sec. 1301, forward, and pursuant thereto to notify appellant as the owner from whom the Government acquired a certain dredger barge, the Marshall C. Harris, of possible reacquisition of rights. The incidental object of the suit also was to restrain the Secretary of the Navy and all others from in any way disposing of the vessel pending a determination of the suit.

The complaint (App. 3 forward) alleged that Appellant is a California corporation which had been in business since 1902. It built for its own use in 1932 the dredger barge Marshall C. Harris which had a tonnage of approximately 685.4 tons, and that it owned and utilized the barge continuously until September 10, 1943, when by bill of sale in conjunction with a rather involved settlement of controversies, title to the barge with a general warranty was transferred from Appellant to the United States.

The complaint further alleged that the United States used the barge until April 1949 when it was declared surplus by the United States Navy. The complaint also alleged that under the terms of Public Law 305, 78th Congress, hereinafter called Public 305, it became and was the ministerial duty of the Maritime Commission (as successor to the Administrator of the War Shipping Administration (App. 3) to "notify the owner from whom such vessel was purchased or requisitioned that the vessel may be returned to such owner upon repayment to the United States of the compensation paid therefor, less such allowances as the administrator may deem reasonable"

to cover the cost of reconditioning and to compensate the owner for use by the United States (App. 34—text of Public 305; App. 7 and 8—complaint).

The complaint also alleged that Appellant had exhausted all administrative remedies within the Commission and had in fact even sought to reopen the case after final action contrary to its interests by the Maritime Commission (App. 6, 7).

The complaint further made many other allegations with respect to the involved transactions between Appellant, Contractors Pacific Naval Air Bases, the insuring companies which had carried insurance on the vessel and subsequently between Appellant and the Martime Commission. However, inasmuch as the suit was dismissed on the grounds that it was a suit against the United States, despite Appellant's contention that it was a suit to compel compliance with an Act of Congress on a ministerial basis, this phase of the allegations of the complaint is not being repeated here.

STATEMENT OF POINTS

1. The Court below erred in holding that a suit against officials of the United States Government seeking to compel them to perform a clear ministerial statutory duty which they have refused to do, is a suit against the United States and therefore should be dismissed on the theory of sovereign immunity.

2. The Court below erred in holding that the doctrine of sovereign immunity protects officers and officials of the United States from personal liability to persons whose property rights they have wrongfully invaded.

3. The Court below erred in not holding that the doctrine of sovereign immunity is inapplicable in cases where Federal officials are acting ultra vires their statutory authorities and duties.

4. The Court below erred in holding that this action involved a controversy with the United States over title to property.

STATUTES INVOLVED

The principal statute involved herein is Public Law 305, 78th Congress, 2nd Session, Title 50 App. U. S. C., Sec. 1301 forward, and is reprinted in full in the appendix at pages 33 to 35.

SUMMARY OF ARGUMENT

I. A Federal Court has the power to compel the performance of a ministerial duty by a Federal official in a case where the failure to comply with such duty results in the invasion of or injury to the rights of a plaintiff, and in such a case the doctrine of sovereign immunity from suit is inapplicable.

II. A suit to compel the members of the Maritime Commission to notify Plaintiff of its reacquisition rights to a vessel under the provisions of a law of Congress is not a controversy over title to United States property and not a suit against the United States which is barred on the theory of sovereign immunity.

ARGUMENT

Introduction

This suit alleges a failure on the part of the members of the Maritime Commission to comply with a ministerial duty required of them by an Act of Congress. It seeks principally mandatory relief to compel such compliance.

The lower Court dismissed the complaint on the theory of sovereign immunity, holding that it was an unauthorized suit against the United States. Appellant says that

is clear error. Rather it is a suit against the individuals alleging failure to comply with their duties to the United States. Parenthetically, prior to establishment of the new Federal Rules, even in form it would have even been brought with the United States as Plaintiff. The law of this country since *Marbury* v. *Madison*, 1 Cranch 137, 2 L. ed. 60; has been that a suit against a Federal official is not necessarily a suit against the Government.

The basic line of division is clear. Refined to its simplest terms the Rule is:

Where an official is acting within his authority he is acting as an agent of the Sovereign and is immune. Where he exceeds his authority or fails to discharge his duty a Court will intervene.

I. A Federal Court Has the Power to Compel the Performance of a Ministerial Duty by a Federal Official in a Case Where the Failure to Comply With Such Duty Results in the Invasion of or Injury to the Rights of a Plaintiff, and in Such a Case the Doctrine of Sovereign Immunity From Suit Is Inapplicable.

Invoking the doctrine of sovereign immunity on behalf of the officials of the Maritime Commission in this manner completely negatives the powers of the Congress of the United States. In this case there is a situation where Congress has enacted a specific provision of law and an instrumentality of the Executive Branch of the Government, has, in effect, nullified the provision, and now comes into Court and alleges itself to be the "Sovereign" and hence immune from judicial review. Certainly this is not the way this Nation is run. Any theory which would permit the Executive Branch of the Government to nullify the action of the Legislative Branch is unsupportable on the basis of reason and precedent.

The only possible conclusion which can be drawn from the action of the lower Court is that the Appellant has

no remedy whatsoever to compel the United States Maritime Commission members to comply with a valid Act of Congress and that they may wholly ignore Public Law 305 of the 78th Congress at their own whim.

This complaint alleges that plaintiff is the owner from whom the dredger barge Marshall C. Harris, was acquired by the United States Government on September 10, 1943. (Complaint, paragraphs 7, 15 and 17; App. 4, 7, 8). It alleges that there is a ministerial duty on the part of the United States Maritime Commission under Public Law 305 (App. 33) to notify the owner that the vessel may be returned upon repayment of compensation subject to adjustment. (Complaint, paragraphs 15, 19 and 20; App. 8 and 9). It alleges that this duty has not been complied with and that unless such is done an irreparable injury will result and asks for injunctive relief restraining the United States from disposing of the vessel and mandatory relief requiring the performance of the ministerial duty in conformity with the terms of the Act.

The basic theory upon which the plaintiff is proceeding in this case was originally announced by the United States Supreme Court in *Marbury* vs. *Madison*, 1 Cranch 137, 2 L. ed. 60. The question has been repeatedly considered by the Supreme Court throughout the history of this country and the doctrine is clearly established that a suit against a federal official is not necessarily a suit against the Federal Government within the rule of immunity from suit without its consent (54 Am. Jur., page 637, paragraph 130):

> "The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded; nor can an officer threatening illegal action claim immunity from an injunction process thereby, or act in excess of his authority or under an authority not validly conferred. The rule of immunity does not have any reference to and does not

include those cases in which officers of the United States are sued, in appropriate form, to compel them to perform some ministerial duty imposed upon them by law, and which they wrongfully neglect or refuse to perform. In such cases, the immunity of the sovereign to suit cannot be invoked to defeat the mandamus to compel performance by the officer of duties imposed upon him by law."

Likewise, in *Land* vs. *Dollar*, 330 U. S. 731, 91 L. ed. 1209, 67 S. Ct. 1009, decided in 1947, the above doctrine is clearly recognized. That case held that an action in a Federal District Court to enforce the return by the United States Maritime Commission of stock in a steamship company which the Commission claimed had been transferred to it outright, but which the plaintiffs claimed merely had been pledged as collateral for a loan which subsequently had been paid, may not be dismissed as one against the United States, prior to a decision on the merits by determining whether the members of the Commission had acted within the scope of their official authority in retaining the stock. The Court said:

"And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld.

"It is in the latter category that the pleadings have cast this case. That is to say, if the allegations of the petition are true, the shares of stock never were property of the United States and are being wrongfully withheld by petitioners who acted in excess of their authority as public officers. If ownership of the shares is in the United States, suit to recover them would of course be a suit against the United States. But if it is decided on the merits either that the contract was illegal or that respondents are pledgors, they are entitled to possession of the shares as against petitioners, though, as we have said, the judgment would not be res judicata as

against the United States. See *United States* v. *Lee*, supra (106 U. S. p. 222, 27 L. ed. 182, 1 S. Ct. 240.)"

See also *Goltra* vs. *Weeks*, 271 U. S. 536, 70 L. ed. 1074, at 545 (1079) saying:

"The bill was suitably framed to secure the relief from an alleged conspiracy of the defendants without lawful right to take away from the plaintiff the boats of which by lease or charter he alleged that he had acquired the lawful possession and enjoyment for a term of five years. He was seeking equitable aid to avoid a threatened trespass upon that property by persons who were government officers. If it was a trespass, then the officers of the government should be restrained whether they professed to be acting for the government or not. Neither they nor the government which they represent could trespass upon the property of another, and it is well settled that they may be stayed in their unlawful proceeding by a court of competent jurisdiction, even though the United States for whom they may profess to act is not a party and can not be made one. *By reason of their illegality, their acts or threatened acts are personal and derive no official justification from their doing them in asserted agency for the government.* The point is fully covered by *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 56 L. ed. 570, 32 Sup. Ct. Rep. 140. In that case, the complainant owned an island in the Ohio River around which the duly authorized officers of Pennsylvania had located a harbor line which by statute was declared to be forever firm and stable. The Secretary of War changed the harbor lines in such a way as to cross the complainant's land within the state harbor line which had never been, as complainant alleged, part of the navigable waters of the United States. The bill averred that the Secretary of War proposed to institute criminal prosecutions with heavy penalties against complainant for his proposed erection of buildings on his own land. It was objected on demurrer that this was a suit against the United States and must be dismissed for lack of its presence as a party. This court declined to yield to the contention as a ground for dismissing the bill. The ruling

is so comprehensive and refers to so many authorities and is so apt that we quote the language at pages 619 and 620:

"'If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. *The exemption of the United States from suit does not protect is officers from personal liability to persons whose rights of property they have wrongfully invaded.*'" (italics supplied)

Appellant's rights have been created by Public Law 305 and invaded by the members of the Martime Commission.

Also in *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 93 L. ed. 1628, decided in 1949, it is said:

"There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign. If the officer purports to act as an individual and not as an official, a suit directed against that action is not a suit against the sovereign. If the War Assets Administrator had completed a sale of his personal home, he presumably could be enjoined from later conveying it to a third person. On a similar theory, where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empoweerd him do do or he is doing it in a way which the sovereign has forbidden. His actions are ultra vires his authority and therefore may be made the object of specific relief. It is important to note that in such cases the relief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power."

In this present case we contend this action of the Commission is not the "act of the sovereign" in not complying with the ministerial duty as set out in the law passed by Congress. At page 701 in the *Larson* case, the Court says:

> "* * * the action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so 'illegal' as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void."

An action canot be that of a sovereign when it is contrary to the enacted laws of that sovereign. In *Philadelphia Co.* vs. *Stimson,* 223 U. S. 605, 56 L. ed. 570, 32 S. Ct. 340, it is said:

> "First. If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. (* * * Citations * * *) And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. (* * * Citations * * *) And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred. (* * * Citations * * *)
>
> "The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States."

In *Wilbur* vs. *U. S. ex rel Kadrie,* 281 U. S. 206, 50 S.

Ct. 320, 74 L. ed. 809, dealing with revocation of allowance of Indian tribal funds, it was said:

> "The duties of executive officers, such as the Secretary of the Interior, usually are connected with the administration of statutes which must be read and in a sense construed to ascertain what is required. But it does not follow that these administrative duties all involve judgment or discretion of the character intended by the rule just stated. Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary."

There are innumerable cases on this point, all to the same effect. *U. S. Sup. Ct. Digest*, Vol. 13, Sec. 99-108; 65 *C. J.*, page 1420, Sec. 195; *Roberts* vs. *U. S. ex rel Valentino*, 176 U. S. 219, 44 L. ed. 443, 20 S. Ct. 376; *Garfield* vs. *U. S. ex rel Goldsby*, 211 U. S. 249, 53 L. ed. 168; *U. S.* vs. *Los Angeles and Salt Lake Railroad Co.*, 273 U. S. 299, 47 S. Ct. 413, 71 L. ed. 651, compelling the Interstate Commerce Commission to make findings as prescribed by Congress in railroad valuations; *Francis Perkins, Secretary of Labor and Edward J. Shaughnessy, Acting Commissioner of Immigration* vs. *Elg*, 307 U. S. 325, 59 S. Ct. 884, 83 L. ed. 1320, allowing mandamus requiring the issuance of a passport which had been refused solely on the ground that applicant had lost her citizenship; *Holloway* vs. *Whiteley*, 4 Wall. 522, 18 L. ed. 335, requiring Commissioner of Patents to receive an application for reissue where the applicant has complied with the law in all respects in the application; *Noble* vs. *Union River Logging Railroad Co.*, 147 U. S. 165, 13 S. Ct. 271, 37 L. ed. 123, *Coe* vs. *U. S.*, 65 App. D. C. 387; *Hammond* vs. *Hull*, 76 U. S. App. D. C. 301; *Groves* vs. *Warren*, 77 U. S. App. D. C. 347; *Ickes* vs. *Ledbetter*, 77 U. S. App. D. C. 358; *Fay* vs. *Miller*, decided in this Court July 3, 1950, #10,364, ___ U. S. App. D. C. ___; *Story* vs. *Snyder*, decided in this Court June 12, 1950, #10,202, ___ U. S. App. D. C. ___.

This court said in *Chambers* vs. *Robertson*, decided June 12, 1950, #10,351, ___ U. S. App. D. C. ___, in a controversy over admitting Veterans Administration records before an Army (Disability) Retiring Board:

> "If this presented a doubtful situation where the language urged by appellant did not plainly carry and require the meaning he asserts, we would hesitate to uphold this remedy (*United States ex rel. v. Interstate Commerce Commission,* 294 U. S. 50, 61; *Interstate Commerce Commission v. New York, N. H. & H. R. Co.,* 287 U. S. 178, 203-204). However, the requirement of the section is clear and unequivocal.
>
> "Also, that action was in an initial stage (*United States ex rel. v. Los Angeles & Salt Lake Railroad Co.,* 273 U. S. 299, 310). While this case has been confined (*Interstate Commerce Commission v. N. Y., N. H. & H. R. Co.,* 287 U. S. 178, 204), yet it is still authority for the use of mandamus 'where the departure from the statute is clear beyond debate' (*Interstate Commerce Commission v. N. Y., N. H. & H. R. C.,* supra P. 204; and see *Addison v. Holly Hill Fruit Products, Inc.,* 322 U. S. 607, 622; *United States ex. rel. v. Interstate Commerce Commission,* 294 U. S. 50, 61; *Interstate Commerce Commission v. United States ex rel. Waste Merchants Assoc. of N. Y.,* 260 U. S. 32, 35).

II. A Suit to Compel the Members of the Maritime Commission to Notify Plaintiff of Its Reacquisition Rights to a Vessel Under the Provisions of a Law of Congress Is Not a Controversy Over Title to United States Property and Not a Suit Against the United States Which Is Barred on the Theory of Sovereign Immunity.

Appellant suggests that the lower Court may have been lead into a belief that this case fell within the class of cases where plaintiff is endeavoring to assert title in property contrary to the interests of the United States. Actually, that is not the case. There is no issue between the United States and the Appellant as such. The issue is whether or not members of the Maritime Commission can

be compelled to conform to a duty prescribed for them by Congress. If they cannot be so compelled, they are setting themselves up as above the Congress of the United States.

In the objectionable class of cases, that is those in which the doctrine of sovereign immunity is held to bar action, there is present either an interference with the executive branch of the Government in the exercise of its functions involving discretion or there is an interference with the public interest in that the case involves a controversy over public funds or public property.

A careful reading of the opinion in the case of *Larson* vs. *Domestic and Foreign Commerce Corp., supra,* will show that virtually all of the previous cases which were decided by the Supreme Court involving Federal officials and the extent of the sovereign immunity rule were considered therein.

That opinion goes on to point out that *Goldberg* vs. *Daniels,* 231 U. S. 218, 58 L. ed. 191, 34 S. Ct. 84, involved an actual attempt to secure specific performance of an alleged contract which would require delivery of a vessel. The Court further pointed out that there was some conflict between the *Goldberg* case and *Goltra* vs. *Weeks, supra,* which case involved the right of possession to certain barges leased by the Government to the plaintiff and held under the *U. S.* vs. *Lee* (106 U. S. 222, 27 L. ed. 182, 1 S. Ct. 240) doctrine that these acts were personal and therefor could be enjoined. The Court said that it adhered to the rule in the *Goldberg* case and the principle above quoted, namely:

> "* * * the action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so 'illegal' as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers * * *."

In the present case, we allege specifically that the members of the Commission are not acting within their statutory powers when they refuse and decline to comply with the provisions of Public Law 305 by giving notice as pre-emptorily required therein. There is no endeavor here to deprive the sovereign behind its back of its property by proceeding against its agents, as has been argued in many of the other cases. Appellant asks for no property; it asks only for a notice. The attempt is at all times to make the individual defendants comply with their duties as required of them by the sovereign through the only machinery which it has for the exercise of its discretionary power, the Congress of the United States.

In all of the cases in which the doctrine of sovereign immunity has been invoked, it simmers down to a question of interest on the part of the United States adverse to the plaintiff. We say in the present suit there is no conflict of interests with the United States, but that there is simply an endeavor on the part of this Appellant to make these officers perform their duty to the United States.

Finally, if consideration is given to the purpose behind the doctrine of sovereign immunity it will be readily realized that its intent is to protect that which is rightfully the property of the Government. Of course, what is lawfully within this category should be protected but the doctrine should never be invoked to cloak unlawful activities of Government officials even though they might result in some financial or other gain to the Government.

CONCLUSION

The effect of the decision of the lower Court in this case is to say that this appellant has no remedy in any court. Our factual allegations must be accepted in their most favorable light and they are that appellant is the owner from whom the Government originally acquired

the dredger barge, Marshall C. Harris, and that Congress has provided a law whereby the Maritime Commission shall notify the owner of its right to reaquire the vessel and thereupon to proceed in accordance with a statutory formula to permit reacquisition. Appellant alleges a direct and deliberate failure on the part of the Commission to comply with this Act of Congress and so notify Appellant, and asks specific relief against government officials to compel the performance of this ministerial duty.

It is the function and duty of the Court to afford this appellant an opportunity to make such a showing, and, upon its so doing, to require these public officials to recognize plaintiff's rights and carry out the laws of Congress which specifically and clearly prescribe the procedures for its benefit.

There is something very unfair, unreasonable and wrong in a situation where the Maritime Commission can act directly contrary to the directives of the Congress of the United States and then contend that *it* is the sovereign and hence not accountable to the people of this country or the Courts hereof for its actions. It is submitted that it is clearly shown herein that on the basis of reason and precedent, the action of the lower Court is in error and should be reversed.

Respectfully submitted,

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APPENDIX

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,723

AMERICAN DREDGING COMPANY, a corporation,

Appellant,

vs.

MAJOR GENERAL PHILIP B. FLEMING, individually and as Chairman of the United States Maritime Commission, et al.,

Appellees.

Appeal from the United States District Court for the District of Columbia

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JOINT APPENDIX

---

1 FILED Apr 5 1950 Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN DREDGING COMPANY
a corporation
1419 Broadway
Oakland, California

Plaintiff

vs.

MAJOR GENERAL PHILIP B. FLEMING
individually and as Chairman of the United States
Maritime Commission
Commerce Building
Washington, D. C.

GRENVILLE MELLEN
individually and as Vice Chairman of the
United States Maritime Commission
Commerce Building
Washington, D. C.

RAYMOND S. McKEOUGH, individually
and as a Commissioner of the
United States Maritime Commission
Commerce Building
Washington, D. C.

JOSEPH K. CARSON, JR., individually
and as a Commissioner of the
United States Maritime Commission
Commerce Building
Washington, D. C.

DAVID J. CODDAIRE, Individually and
as a Commissioner of the United States
Maritime Commission
Commerce Building
Washington, D. C.

FRANCIS P. MATTHEWS, individually
and as Secretary, Department of
the Navy
National Defense Building
Washington, D. C.

Defendants

Civil Action No. 1538-'50

Complaint for Injunction and Mandatory Relief

The complaint of the American Dredging Company, a corporation organized and existing under the laws of the State of California, respectfully says:

1. The amount in controversy, exclusive of interest and costs in this cause, exceeds the sum of $3,000.00.

2 The action arises under Public Law 305, 78th Congress, 50 App. U. S. Code 1301 forward, 58 Stat. 223 (Exhibit 12), which act authorized the return to original private ownership of certain vessels acquired by the Government, and specifically from the failure and refusal of defendant Commissioners of the United States Maritime Commission to permit plaintiff to reacquire a dredger barge, THE MARSHALL C. HARRIS, thereunder.

2. The foregoing Act authorizes this return to private ownership by the War Shipping Administration. However, under Section 202 of the Act approved July 8, 1946, 60 Stat. 501, 50 App. U. S. C. A. 1291 note, effective September 1, 1946, the War Shipping Administration was abolished and all of its powers, functions and duties were transferred to the Maritime Commission.

3. Defendants Fleming, Mellen, McKeough, Carson and Coddaire are sued herein as defendants individually and in their official capacities as members of the United States Maritime Commission.

4. The defendant Matthews is sued in his individual capacity and as Secretary of the Navy. He is included as a defendant herein by reason of the fact that the final

action of the United States Maritime Commission in denying plaintiff's rights under the Act also provided that any disposition of THE MARSHALL C. HARRIS is the responsibility of the Department of the Navy.

5. Since its organization in 1902 plaintiff has been engaged in dredging and related activities on the West Coast of the United States. The dredger vessel, THE MARSHALL C. HARRIS was constructed at Oakland, California, by plaintiff and completed in 1932. Its tonnage, measured according to T. 46 U. S. C. 77, is approximately 685.4. Plaintiff retained title to and used or leased this vessel in its own activities until the time of its acquisition by the United States in 1943. The dredge did not become seventeen years of age until 1949, and was not traded in under section 510, Merchant Marine Act, as amended (46 U. S. C. 1160) or any other provision of law.

6. From June 7, 1941 until April 2, 1943, the vessel was operated on a bareboat charter between plaintiff and a group of contractors operating a joint venture under the name of Contractors, Pacific Naval Air Bases. This group was engaged on a cost-plus-fixed-fee U. S. Navy war contract, NOy 4173, in extensive construction activities in and around Pearl Harbor, Hawaiian Islands.

3 The charter was to have run under the then existing agreements to December 1, 1943. In connection with this charter, the dredge had been covered by comprehensive insurance in the amount of $600,000 in favor of plaintiff and Contractors, Pacific Naval Air Bases.

7. On April 2, 1943, while being operated under this charter, the vessel sank at the entrance to the harbor of Honolulu, Territory of Hawaii, in approximately 25 feet of water. Subsequent to the sinking, extensive negotiations were conducted between the plaintiff, the Contractors, Pacific Naval Air Bases, the U. S. Navy and the group of insurers for THE MARSHALL C. HARRIS. Abandonment of the dredge was not considered by the Navy, inasmuch as it was readily salvagable, was urgently needed in connection with war operations in the Pacific, and was

an obstruction to navigation. It was determined that such salvage of the dredger could only be done by the Navy Department, since it was impracticable due to war conditions for either the owner or the underwriters to raise the dredger and tow her to the West Coast and repair her there. The raising of the dredge was commenced by the Navy during the course of negotiations. On May 27, 1943, a "tender of abandonment" *claiming a total loss* was made by plaintiff to the underwriters, but this was refused. A committee representing the 23 underwriters with full powers to effect a settlement of the controversy was appointed through the Board of Marine Underwriters at San Francisco and an ultimate compromise was made September 10-18, 1943, providing that "no title to or interest in the said Dredger Marshall C. Harris" was acquired by the underwriters. (See Exhibits 1, 2, 3 and 4). The terms provided for (a) a payment by the underwriters to the American Dredging Company of $450,000.00; (b) a surrender and release of all claims under all policies by Contractors, Pacific Naval Air Bases and the American Dredging Company; (c) a release by the American Dredging Company of its right to charter hire from the United States at $22,500.00 per month from April 2, 1943 to September 10, 1943, or $118,500.00; (d) a sale by Bill of Sale with *general warranty* of title to the dredge from the American Dredging Company to the United States.

4 8. In addition, the auxiliary plant and equipment was subsequently sold to the United States for the sum of $90,000.00, this not having been covered by the original $600,000.00 insurance policy, and charter hire on this auxiliary plant waived from April 2, 1943.

9. Meanwhile, salvaging operations had been undertaken by the Navy, having been commenced by the Navy sometime in June 1943, as the dredger was urgently needed for operations in the Pacific, and the ship was refloated September 2, 1943 (Exhibits 9 and 10).

10. The United States completed rehabilitation of the dredge and sent it to Guam in February 1945 and used it

continuously until August 1948 when it was returned to Long Beach. It was declared surplus by the Navy and made available to the Maritime Commission in accordance with Public Law 305 in April 1949, and negotiations between the Commission and the American Dredging Company have been in progress since that time.

11. The Maritime Commission informed plaintiff by letter dated July 1, 1949 (Exhibit 5) that the status of THE MARSHALL C. HARRIS under Public Law 305 had not been determined fully, but inquired whether plaintiff was interested in reacquiring same. Under date of July 8, 1949, plaintiff informed the Maritime Commission that it was definitely interested in acqiring THE MARSHALL C. HARRIS and designated a representative to negotiate (Exhibit 6). In accordance with the request of the Commission proof of former ownership was submitted to it by plaintiff.

12. Negotiations continued between plaintiff, through its representative and counsel, and officials of the Maritime Commission, and by letter dated December 22, 1949, the Commission informed plaintiff that it had been determined that Public Law 305 was not applicable to THE MARSHALL C. HARRIS, although it gave no reason for such determination, that the Department of the Navy had been notified that any action concerning same was the responsibility of that Department, and indicating that the Navy Department had authority to dispose of the vessel by public sale. (Exhibit 7).

5 13. Plaintiff, through counsel, under letter dated January 16, 1950, requested a reconsideration of this determination emphasizing that the vessel was afloat when sold to the United States, had never been abandoned, and that it was undisputed that title was in plaintiff as of the time of its acquisition by the Government (Exhibit 8). Further information was furnished in support thereof under letter dated January 31, 1950, and affidavit of Russell S. Harris, vice-president of plaintiff (Exhibits 9 and 10).

14. Counsel for plaintiff were informed by letter dated March 2, 1950 that the Maritime Commission had considered the additional statements, but confirmed the determination as set out in the letter of December 22, 1949 that Public Law 305 was inapplicable, but still gave no grounds for such determination (Exhibit 11).

15. Plaintiff avers that the determination made by the Maritime Commission is directly contrary to the provisions of Public Law 305. The American Dredging Company is the owner from whom THE MARSHALL C. HARRIS was purchased by the United States and as such is entitled to reacquire her under the terms of Public Law 305, 78th Congress (Title 50 App. U. S. C. 1301, forward) (Exhibit 11). This law provides that a vessel of one thousand gross tons or less which has been determined as no longer needed, etc., shall be made available to the Administrator of the War Shipping Administration "who shall notify *the owner from whom such vessel was purchased* or requisitioned that the vessel may be returned to such owner upon repayment to the United States of the compensation paid therefor less such allowances as the Administrator may deem reasonable (1) to cover the cost of such reconditioning as the Administrator after consultation with the owner deems necessary to restore the vessel to condition and utility at least as good as when acquired by the United States (ordinary wear and tear excepted), and (2) to compensate such owner for the use of the vessel by the United States, and upon compliance with such other terms and conditions as the Administrator may prescribe. The determination of such allowance by the Administrator shall be final notwithstanding any other provision of law." (underscoring supplied.)

16. The sinking and subsequent negotiations and agreements between the American Dredging Company, the underwriters, the Contractors, Pacific Naval Air Bases, and the United States, did not divest title to THE MARSHALL C. HARRIS from American Dredging Company until a direct transfer was made to the United

States by bill of sale from plaintiff to the United States, dated September 10, 1943, at which time the vessel was again afloat.

17. The American Dredging Company has been recognized and accepted as the owner of the dredge by the United States and all others from the time of its construction until September 10, 1943, when the United States accepted a transfer of ownership with general warranty of title from American Dredging Company.

18. The series of transactions involving THE MARSHALL C. HARRIS resulted in substantial financial benefits to the Government of the United States including waiver by plaintiff of substantial sums in charter hire and were made during the greatest stress of the War as a part of a united national effort. This factor should weigh heavily in considering the equities of the American Dredging Company.

19. By reason of the premises herein recited, it was and still is the ministerial duty of the defendant Commissioners, under Public Law 305, to notify plaintiff that the dredge may be returned to plaintiff upon repayment to the United States of the compensation paid therefor less reasonable allowances determined by the defendant Commissioners to cover the cost of reconditioning and to compensate plaintiff for the use of the dredge. Notwithstanding such ministerial duty, the defendant Commissioners have failed and refused to notify plaintiff of its right to return of the vessel under the Act, and to notify plaintiff of their determination as to the amounts of the allowance for reconditioning and the allowance for compensation for the use of the dredge, or to permit plaintiff to reacquire the said vessel in any manner.

20. The Act imposed a clear and peremptory statutory duty upon the defendant Commissioners, the performance of which is a plain, ministerial act, and does not involve discretion. Interpretation of the Act by defendants is not necessary in view of its clear and unambiguous terms. The determination made by the defendant Commissioners that

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15. Plaintiff avers that the determination made by the Maritime Commission is directly contrary to the provisions of Public Law 305. The American Dredging Company is the owner from whom THE MARSHALL C. HARRIS was purchased by the United States and as such is entitled to reacquire her under the terms of Public Law 305, 78th Congress (Title 50 App. U. S. C. 1301, forward) (Exhibit 11). This law provides that a vessel of one thousand gross tons or less which has been determined as no longer needed, etc., shall be made available to the Administrator of the War Shipping Administration "who shall notify *the owner from whom such vessel was purchased* or requisitioned that the vessel may be returned to such owner upon repayment to the United States of the compensation paid therefor less such allowances as the Administrator may deem reasonable (1) to cover the cost of such reconditioning as the Administrator after consultation with the owner deems necessary to restore the vessel to condition and utility at least as good as when acquired by the United States (ordinary wear and tear excepted), and (2) to compensate such owner for the use of the vessel by the United States, and upon compliance with such other terms and conditions as the Administrator may prescribe. The determination of such allowance by the Administrator shall be final notwithstanding any other provision of law." (underscoring supplied.)

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18. The series of transactions involving THE MARSHALL C. HARRIS resulted in substantial financial benefits to the Government of the United States including waiver by plaintiff of substantial sums in charter hire and were made during the greatest stress of the War as a part of a united national effort. This factor should weigh heavily in considering the equities of the American Dredging Company.

19. By reason of the premises herein recited, it was and still is the ministerial duty of the defendant Commissioners, under Public Law 305, to notify plaintiff that the dredge may be returned to plaintiff upon repayment to the United States of the compensation paid therefor less reasonable allowances determined by the defendant Commissioners to cover the cost of reconditioning and to compensate plaintiff for the use of the dredge. Notwithstanding such ministerial duty, the defendant Commissioners have failed and refused to notify plaintiff of its right to return of the vessel under the Act, and to notify plaintiff of their determination as to the amounts of the allowance for reconditioning and the allowance for compensation for the use of the dredge, or to permit plaintiff to reacquire the said vessel in any manner.

20. The Act imposed a clear and peremptory statutory duty upon the defendant Commissioners, the performance of which is a plain, ministerial act, and does not involve discretion. Interpretation of the Act by defendants is not necessary in view of its clear and unambiguous terms. The determination made by the defendant Commissioners that

the dredge MARSHALL C. HARRIS is not covered by the Act is clearly wrong, arbitrary and capricious, and without basis. Plaintiff has exhausted its administrative remedies, and has no judicial remedy other than
7 this action for mandatory and injunctive relief.

21. It is the duty of the Secretary of the Navy and the Department of the Navy to take such necessary steps as will prevent the vessel from being advertised, sold or otherwise disposed of, thereby preventing its acquisition by plaintiff under the said law.

22. Plaintiff avers that there does not exist any plain, speedy, adequate or complete remedy at law for the protection of its rights and that irrecoverable damages and irreparable injury will result to it unless injunctive processes of this court enforces the compliance with said Public Law 305.

WHEREFORE, the plaintiff prays:

1. That this court issue an injunction pendente lite and permanently against the defendants and each of them individually and in their respective official capacities as above set forth, and all persons acting or assuming to act under their direction, enjoining and restraining them from disposing of the dredger barge MARSHALL C. HARRIS, heretofore known as U. S. S. YM25, by sale, gift, exchange, destruction, disassembling, or otherwise.

2. That the said defendants, Major General Philip B. Fleming, Grenville Mellen, Raymond S. McKeough, Joseph K. Carson, Jr., David J. Coddaire and Francis P. Matthews, and each of them, be ordered, compelled and required to perform their ministerial duties as set out in Public Law 305, 78th Congress, to return to this plaintiff under the terms of said law the said vessel MARSHALL C. HARRIS.

3. That the defendants and each of them be directed and ordered in the manner of a mandamus to perform their several ministerial duties in the premises to the end that the said MARSHALL C. HARRIS may be returned

to this plaintiff pursuant to the above cited Public Law 305, 78th Congress.

4. That the plaintiff have such other and further relief as to the Court may seem just and proper.

HUDSON, CREYKE & LIPSCOMB
By /s/ Geoffrey Creyke, Jr.
Geoffrey Creyke, Jr.
Attorneys for plaintiff
444 Washington Building

8 *Index of Exhibits*

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12. P. L. 305—78th Congress.

9 Filed Apr 5 1950 Harry M. Hull, Clerk

Exhibit 1

This memorandum of agreement made and entered into this 18th day of September, 1943, by and between the American Dredging Company, hereinafter referred to as Owner, and Contractor-Pacific Naval Air Bases, hereinafter referred to as Charterer;

Witnesseth:

Whereas the parties hereto entered into a charter-party on June 7, 1941, pursuant to which Charterer took possession of the dredge Marshall C. Harris, her gear, equipment and auxiliary plant, and other materials for use in the performance of work being done for the Navy of the United States by the Charterer; and

Whereas said dredge was insured against marine risks with both parties hereto being named in the policies of insurance as assureds; and

Whereas said dredge sank on or about April 2, 1943, since which time expenses have been incurred and are being incurred in raising and salvaging said dredge, her gear and equipment; and

Whereas the insurers of said dredge and the parties hereto have agreed upon a settlement under which the Owner shall receive from said insurers the sum of $450,000 and surrender all policies of insurance covering said dredge and sell, transfer and deliver said dredge to the United States of America (the Charterer's principal);

Now Therefore It is Hereby Understood and Agreed as follows:

1. Owner shall sell, transfer and deliver said dredge Marshall C. Harris, her gear, equipment, and two swing

anchors "as is" and "where is" to the United States of America.

2. Charterer shall assume all expenses heretofore incurred and which may be incurred hereafter in connection with the salvage and raising of the dredge.

10 3. Charterer shall join in the execution of any releases or documents that may be required by the underwriters in order to effectuate the settlement and permit the payment of the sum of $450,000 to Owner.

4. Charterer is hereby relieved of liability for charter hire of dredge, her gear and equipment, from and after the date of the sinking and shall also be relieved of all other obligations under said charter-party with respect to the dredge, her gear and equipment.

5. No charter hire shall be payable by Charterer to Owner for the auxiliary plant and equipment specified in the exhibits attached hereto for the period from April 2, 1943, to August 2, 1943, inclusive.

6. Charter hire for the auxiliary plant and equipment specified in the exhibits attached hereto shall be at the rate of $3000 per month from and after the 2d day of August, 1943, which sum shall be paid to Owner by Charterer as provided in said charter party.

7. Charterer or the United States of America shall have the privilege of purchasing the auxiliary plant and equipment specified in the exhibits attached hereto or any part thereof at a fair price, in which event the said monthly hire of $3000 shall be proportionately reduced thereafter to compensate for any gear or equipment so purchased.

7 A. Except as herein expressly modified, the terms and conditions of said charter-party of June 7, 1941, shall continue to apply to said auxiliary plant and equipment, specified in the attached exhibits. All pipe-line and pipe not purchased by the Charterer, as herein provided, shall be returned to Owner in as good order and condition as when delivered or payment shall be made to Owner for wear or depreciation of same.

the dredge MARSHALL C. HARRIS is not covered by the Act is clearly wrong, arbitrary and capricious, and without basis. Plaintiff has exhausted its administrative remedies, and has no judicial remedy other than
7 this action for mandatory and injunctive relief.

21. It is the duty of the Secretary of the Navy and the Department of the Navy to take such necessary steps as will prevent the vessel from being advertised, sold or otherwise disposed of, thereby preventing its acquisition by plaintiff under the said law.

22. Plaintiff avers that there does not exist any plain, speedy, adequate or complete remedy at law for the protection of its rights and that irrecoverable damages and irreparable injury will result to it unless injunctive processes of this court enforces the compliance with said Public Law 305.

WHEREFORE, the plaintiff prays:

1. That this court issue an injunction pendente lite and permanently against the defendants and each of them individually and in their respective official capacities as above set forth, and all persons acting or assuming to act under their direction, enjoining and restraining them from disposing of the dredger barge MARSHALL C. HARRIS, heretofore known as U. S. S. YM25, by sale, gift, exchange, destruction, disassembling, or otherwise.

2. That the said defendants, Major General Philip B. Fleming, Grenville Mellen, Raymond S. McKeough, Joseph K. Carson, Jr., David J. Coddaire and Francis P. Matthews, and each of them, be ordered, compelled and required to perform their ministerial duties as set out in Public Law 305, 78th Congress, to return to this plaintiff under the terms of said law the said vessel MARSHALL C. HARRIS.

3. That the defendants and each of them be directed and ordered in the manner of a mandamus to perform their several ministerial duties in the premises to the end that the said MARSHALL C. HARRIS may be returned

to this plaintiff pursuant to the above cited Public Law 305, 78th Congress.

4. That the plaintiff have such other and further relief as to the Court may seem just and proper.

HUDSON, CREYKE & LIPSCOMB
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Witnesseth:

Whereas the parties hereto entered into a charter-party on June 7, 1941, pursuant to which Charterer took possession of the dredge Marshall C. Harris, her gear, equipment and auxiliary plant, and other materials for use in the performance of work being done for the Navy of the United States by the Charterer; and

Whereas said dredge was insured against marine risks with both parties hereto being named in the policies of insurance as assureds; and

Whereas said dredge sank on or about April 2, 1943, since which time expenses have been incurred and are being incurred in raising and salvaging said dredge, her gear and equipment; and

Whereas the insurers of said dredge and the parties hereto have agreed upon a settlement under which the Owner shall receive from said insurers the sum of $450,000 and surrender all policies of insurance covering said dredge and sell, transfer and deliver said dredge to the United States of America (the Charterer's principal);

Now Therefore It is Hereby Understood and Agreed as follows:

1. Owner shall sell, transfer and deliver said dredge Marshall C. Harris, her gear, equipment, and two swing

anchors "as is" and "where is" to the United States of America.

2. Charterer shall assume all expenses heretofore incurred and which may be incurred hereafter in connection with the salvage and raising of the dredge.

10 3. Charterer shall join in the execution of any releases or documents that may be required by the underwriters in order to effectuate the settlement and permit the payment of the sum of $450,000 to Owner.

4. Charterer is hereby relieved of liability for charter hire of dredge, her gear and equipment, from and after the date of the sinking and shall also be relieved of all other obligations under said charter-party with respect to the dredge, her gear and equipment.

5. No charter hire shall be payable by Charterer to Owner for the auxiliary plant and equipment specified in the exhibits attached hereto for the period from April 2, 1943, to August 2, 1943, inclusive.

6. Charter hire for the auxiliary plant and equipment specified in the exhibits attached hereto shall be at the rate of $3000 per month from and after the 2d day of August, 1943, which sum shall be paid to Owner by Charterer as provided in said charter party.

7. Charterer or the United States of America shall have the privilege of purchasing the auxiliary plant and equipment specified in the exhibits attached hereto or any part thereof at a fair price, in which event the said monthly hire of $3000 shall be proportionately reduced thereafter to compensate for any gear or equipment so purchased.

7 A. Except as herein expressly modified, the terms and conditions of said charter-party of June 7, 1941, shall continue to apply to said auxiliary plant and equipment, specified in the attached exhibits. All pipe-line and pipe not purchased by the Charterer, as herein provided, shall be returned to Owner in as good order and condition as when delivered or payment shall be made to Owner for wear or depreciation of same.

8. Charterer shall be privileged at any time to return to Owner at San Francisco the whole or any part of the auxiliary plant and equipment specified in the exhibits attached hereto. If the whole thereof is so returned hire thereon shall thereupon cease. If any part thereof is so returned payment of the monthly hire shall also be proportionately reduced thereafter to compensate for any such auxiliary plant and equipment so returned.

11 In Witness Whereof the parties hereto have by the undersigned duly authorized representatives duly executed these presents.

American Dredging Company
a corporation.
By /s/ Russell S. Harris
Vice-President
By /s/ J. F. Corbett
Assistant Secretary
Owner.

(CORPORATE SEAL)

Contractors-Pacific Naval Air Bases
Contract NOy-4173, for and on
behalf of
Hawaiian Dredging Company, Ltd.
Raymond Concrete Pile Company
Turner Construction Company
Morrison-Knudsen Company, Inc.
J. M. Pomeroy & Company, Inc.
W. A. Bechtel Co.
Utah Construction Company
John E. Byrne
Winifred W. Shelton
Milton L. Bass
John E. Byrne, Jr.,
Co-partners.
By /s/ G. F. Ferris
Charterer.

APPROVED:
/s/ .....
Officer in Charge

12 *Exhibit A*

1. RD-7 Caterpillar Tractor
2. Tug Yankee
3. Dorrick Barge No. 12
4. Anchor Barge No. 9
5. Anchor Barge No. 7
6. Cable Barge and her cable.

Anchors and Buoys

5 — 4000#
1 — 2470#
2 — 3000#
4 — 1000#
2 — 1500#
2 — 1200#
1 — 1800#
1 — 6000#
1 — 3500#
1 — 10,000#
25 — Buoys

13 *Exhibit B*

238 Shore Pipe	27″ x 16′)	
2 Shore Pipe	27″ x 10′)	80%
184 Shore Pipe	27″ x 16′	65%
224 Shore Pipe	27″ x 16′	45%
1 90° Elbow		90%
1 90° Elbow		80%
1 90° Elbow		65%
1 45° Elbow		80%
3 45° Elbow		60%
1 22° Elbow		60%
2 Balance Switches		75%
1 Extra Nipple		90%
1 Extra Nipple		80%
1 Extra Nipple		40%
1 Old Style "Y"		50%

1	Landing Pipe 27″ x 18′	45%
1	Landing Pipe 27″ x 50″	45%
20	Rubber Sleeves 28″ I. D. x 32″ Ave.	70%
1	Rubber Sleeve 28″ I. D. x 24″	60%
2	Beebe Bros. Hand Crab Mounted	50%
127	Patch Bands 1/2″ Diameter	
53	Connecting Bands for Rubber Sleeves	
18	Eye Bolts for Sleeve Bands	
14	Assorted Turn Buckles	

14 *Exhibit C*

Pontoon Line

6 — 100′	Lengths		90%
5 — 50′	”		80%
5 — 50′	”		40%
4 — 50′	”		35%
1 — 50′	”		50%
2 — 50′	”		65%
1 — 50′	”		20%
1 — 50′	”		15%
1 — 63′	”		50%
1 — 67′	”		65%
1 — 62′ 6″	”		70%
1 — 43′	”		75%
1 — 41′	”		95%
2 — 66′	”		30%
1 — 60′	”		65%
1 — 13′	”		90%
1 — 38′	”	(Socket & Flange)	50%
1 — Elbow			95%
1 — Elbow			15%

Ball Joint Sockets

12 Sockets	90%
29 Sockets	40%

Ball Joints

10 Balls	95%
10 Balls	65%
18 Balls	25%

Pontoons

75 Pairs Standard Size
1 Pair Large Landing Pontoons

15 Filed Apr 5 1950 Harry M. Hull, Clerk

Exhibit 2

Full Release

KNOW ALL MEN BY THESE PRESENTS:

That HAWAIIAN DREDGING CO., LTD., a corporation, RAYMOND CONCRETE PILE CO., a corporation, TURNER CONSTRUCTION COMPANY, a corporation, MORRISON-KNUDSEN COMPANY, INC., a corporation, J. M. POMEROY & COMPANY, INC., a corporation, W. A. BECHTEL CO., a corporation, UTAH CONSTRUCTION COMPANY, a corporation, and JOHN E. BYRNE, and each of them, operating under a joint venture and under the name and style of "Contractors—Pacific Naval Air Bases" (sometimes herein called the "Contractors"), and AMERICAN DREDGING COMPANY, a corporation, charterers and owners, respectively, of the American dredger barge Marshall C. Harris, her gear and equipment (all and each hereinafter called the "Assureds" and included in said term when used), for and in consideration of the agreed sum of Four Hundred Fifty Thousand Dollars ($450,000) lawful money of the United States of America to the said American Dredging Company, a corporation, one of said Assureds, in hand paid (on the order and request of Contractors-Pacific Naval Air Bases, hereby given) by the underwriters and insurance companies whose names are listed below (hereinafter called the "Underwriters") in the amounts and pursuant to the insurance policies numbered as set oppo-

site their names respectively, have jointly and severally remised, released and forever discharged, and by these presents do, for themselvs, jointly and severally, and their respective successors and assigns and each of them, remise, release and forever discharge the said Underwriters and each of them, and their respective successors and assigns, of and from any and all liability, claims and demands
16 of every kind and character whatsoever which may have arisen or accrued or which may or can arise or accrue, whether presently known or not, under or in connection with any or all policies of insurance issued by said Underwriters upon the hull, machinery, etc., including gear, equipment and auxiliary plant of the dredger barge called the Marshall C. Harris, or upon disbursements including excess liabilities of said dredger barge Marshall C. Harris; the numbers of all of which policies are, for greater particularity, set opposite the names of the respective Underwriters as listed below.

This release covers particularly but not exclusively all liability, claims and demands under said policies of every kind or character whatsoever, whether presently known or not, and whether for salvage expenses or sue and labor or special charges and whether for damage repaired, to be repaired, unrepaired or unrepairable, or for depreciation, arising out of or in connection with, or which may arise out of or in connection with, the capsizing and/or overturning and/or sinking of the said dredger barge Marshall C. Harris in or about the harbor of Honolulu on or about April 2, 1943, and/or salvage operations undertaken on account thereof.

Said Contractors - Pacific Naval Air Bases and the corporations and individual aforesaid operating in the joint venture under that name and style do hereby jointly and severally request and order the Underwriters to pay the aforesaid sum of $450,000 to American Dredging Company aforesaid.

It is stipulated that this release is in consummation and

confirmation of a compromise settlement agreed upon between the parties hereto on August 2, 1943, and that all liability of the Underwriters on said policies and
17 each of them terminated as of April 2, 1943, the date of the sinking of said dredger, and in further confirmation thereof the said Assureds have concurrently herewith surrendered said policies to the Underwriters for cancellation and as cancelled.

The undersigned and each of them covenant that the said American Dredging Comany is legally entitled to receive the amount paid in this settlement and that the undersigned are legally authorized to give a full and valid release in the premises and hereby agree to indemnify and hold harmless the undermentioned Underwriters and each and all of them from any and all claims, demands, liability, loss, damage and expense which they or any one or more of them may sustain by reason of the assertion, hereafter, of any claim under any of said policies by any party, or by reason of any want of authority on the part of the Assureds or any of them to receive this payment and give this release.

Each of the contractors, operating as a joint venture under the name and style of Contractors - Pacific Naval Air Bases, does hereby warrant that there is no person, firm or corporation operating under the name and style of Contractors - Pacific Naval Air Bases by joint venture or otherwise, other than the eight parties designated as such in the opening paragraph of this release, who are or were interested in the charter party of the dredger barge Marshall C. Harris or who are or have been insured by that name under the policies herein referred to, and that this release and agreement has been executed on behalf of and as the act and deed of each of said contractors by officers or representatives thereunto duly authorized, and said contractors do, jointly and severally, agree to indemnify and hold harmless the Underwriters and all and each of them from all claims, demands, liability, loss, damage, cost and expense, including attorneys' fees, that may or

shall arise from any breach of this warranty, or the assertion of any fact inconsistent with this warranty.

18 The Underwriters and the numbers of the insurance policies referred to above, and the amounts paid by each of said Underwriters, are as follows:

Name of Company	*Policy Number* *Hull Insurance*	*Disbursement Insurance*	*Proportion of Settlement Paid*
American Eagle Fire Insurance Company	298	299	$ 3,750.00
Boston Insurance Co.	16245	16246	11,250.00
British and Foreign Marine Insurance Co., Ltd.	HL8810	HL8811	13,125.00
Commercial Union Assurance Co., Ltd.	8940	8941	13,500.00
Continental Insurance Co.	234185	234186	33,750.00
Detroit Fire and Marine Insurance Company	42/526	42/527	22,500.00
Federal Insurance Company	HF13822	HF13823	45,000.00
Firemen's Fund Insurance Company	25239	25241	22,500.00
The Hartford Fire Insurance Co.	2426	2427	11,250.00
The Hartford Fire Insurance Company, New York	58844	58845	31,500.00
Insurance Company of North America	SFH11831	SFH11832	17,625.00
The London Assurance Co.	42/698	42/699	14,250.00
Newark Fire Insurance Co. (N. Y.)	200053	200052	4,500.00
North British & Mercantile Insurance Co., Ltd.	13254	13255	11,250.00
Queen Insurance Company	C42/4063	C42/4064	9,000.00
Royal Insurance Co., Ltd. (N. Y.)	201031	201032	11,250.00
Standard Marine InsuranceCompany, Ltd.	20881	20882	7,500.00
St. Paul Fire & Marine Insurance Co. (N.Y.)	5H5887	5H5888	11,250.00
Union Insurance Society of Canton, Ltd.	42/2792	42/2793	4,500.00
The Union Marine and General Insurance Co., Ltd.	7852	7853	4,500.00
Universal Insurance Company	89910	89911	112,500.00
Utah Home Fire Insurance Co.	3583	3584	11,250.00
Westchester Fire Insurance Co.	13978	13979	22,500.00

19 IN WITNESS WHEREOF the said Hawaiian Dredging Co., Ltd., a corporation, Raymond Concrete Pile Co., a corporation, Turner Construction Company, a corporation, Morrison-Knudsen Company, Inc., a corporation, J. M. Pomeroy & Company, Inc., a corporation, W. A. Bechtel Co., a corporation, Utah Construction Company, a corporation, and John E. Byrne, individually and as operating under the name and style of Contractors - Pacific Naval Air Bases, and American Dredging Company, a corporation, have caused their corporate names and seals to be hereunto affixed and these presents, in separate original parts, to be signed and executed by their duly authorized officers, and John E. Byrne has executed the same, this 10th day of September, 1943, said original parts to be effective and binding as if one original had been signed by all.

(Corporate Seal) HAWIIAN DREDGING CO., LTD.,
By C. F. Weeber
Its Vice-President
By H. P. Benson
Its Treasurer

(Corporate Seal) RAYMOND CONCRETE PILE CO.,
By Wm. O. McMenimen
Its Vice-President and
Gen'l Mgr.
By R. D. Case
Its Secretary

(Corporate Seal) TURNER CONSTRUCTION COMPANY
By J. Archer Turner
Its President
By W. B. Ball
Its Secretary

(Corporate Seal) MORRISON-KNUDSEN COMPANY, INC.
By W. H. Puckett
Its Vice-President
By Carroll F. Zapp
Its Secretary

(Corporate Seal) J. H. POMEROY & COMPANY, INC.
By J. H. Pomeroy
Its President
By _____
Its _____

(Corporate Seal) W. A. BECHTEL CO.,
By K. K. Bechtel
Its Vice-President
By B. M. Eubanks
Its Secretary

(Corporate Seal) THE UTAH CONSTRUCTION COMPANY
By L. S. Carey
Its President & Gen. Mgr.
By W. H. Harris
Its Secretary

John E. Byrne, Winifred W. Shelton, Melton L. Bass, John E. Byrne, Jr., co-partners
By John E. Byrne
Individually and as operating Under the Name and Style of Contractors - Pacific Naval Air Bases

(Corporate Seal) AMERICAN DREDGING COMPANY
By Russell S. Harris
Its Vice-President
By J. F. Corbett
Its Assistant Secretary

21 Filed Apr 5 1950 Harry M. Hull, Clerk

Exhibit 3

Form C-1

Contractors

PACIFIC NAVAL AIR BASES

Contracts NOy-3550 and NOy-4173
Address Correspondence To
P. O. Box 857
Oakland 4, California

Hawaiian Dredging Company, Ltd.
Raymond Concrete Pile Company
Turner Construction Company
Morrison-Knudsen Company, Inc.
J. H. Pomeroy & Company, Inc.
W. A. Bechtel Co.
Utah Construction Company
Byrne Organization

September 22, 1943

American Predging Company
1419 Broadway
Oakland, California

REFERENCE—OUR ORDER NO. 12796 (Chg. D)
Dredger Barge "MARSHALL C. HARRIS"

Gentlemen:

The Dredge "MARSHALL C. HARRIS" has been transferred by the American Dredging Company to the United States Government on Bill of Sale, and is now the property of the United States Government.

The Charter is, therefore, modified by the attached memorandum of agreement dated the 18th day of September, 1943, copy of which is attached hereto.

All terms of this modification of Purchase Order 12796 shall be in accordance with the terms of said agreement.

Also attached is copy of Bill of Sale.

RH:ir

APPROVED FOR U. S. GOVERNMENT
By—For Resident Officer-in-Charge
/s/ L. L. Johnson

CONTRACTORS PACIFIC NAVAL AIR BASES
Contracts NOy 3550 and NOy 4173
/s/ R. Hayden
R. Hayden, Asst. Proj. Mgr.
For Purchasing Agent

22 TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

Know ye, that American Dredging Company, a corporation, the sole owner of the American dredger barge "Marshall C. Harris" of San Francisco, of the burden of 685.40 gross tons or thereabouts, for and in consideration of the sum of ten dollars ($10) lawful money of the United States of America to it in hand paid, before the sealing and delivery of these presents, by the United States of America, the receipt whereof it does hereby acknowledge and is therewith fully satisfied, contended, and paid, have bargained and sold, and by these presents does bargain and sell, unto the said Untied States of America the said American dredger barge "Marshall C. Harris" ("as is" and "where is"), together with her gear, equipment and two swing anchors weighing, respectively, eight and fifteen tons, and all other necessaries thereunto appertaining and belonging:

To Have and to Hold the said American dredger barge "Marshall C. Harris" and appurtenance thereunto belonging unto the said United States of America to the sole and only proper use, benefit, and behoof of the said United States of America forever: and it, the said American Dredging Company, a corporation, has promised, covenant,

and agree, to and with the said United States of America to warrant and defend the title to said American dredger barge "Marshall C. Harris", "as is" and "where is" and all the other beforementioned appurtenances against all and every person and persons whomsoever.

In testimony whereof, the said American Dredging Company has hereunto, by its officers thereunto duly authorized, set its hand and seal this 10th day of September, 1943.

AMERICAN DREDGING COMPANY,
a corporation
By /s/ Russell S. Harris
Vice President
By /s/ J. F. Corbett
Asst. Secretary
(Corporate Seal)

23 Filed Apr 5 1950 Harry M. Hull, Clerk

Exhibit 4

TO WHOM IT MAY CONCERN:

The undersigned were three of the four members of a Committee appointed to act for and in the place of the Hull Underwriters on the American Dredger Marshall C. Harris in connection with the claim upon the Hull Underwriters for damage to the Dredger when she sank in or near the Harbor of Honolulu, T. H. on April 2, 1943. The fourth member of the Committee is presently in Europe.

The extent of the loss was in dispute and as the result of negotiations between the Committee, authorized by the interested underwriters, and the named assureds under the hull policies, a compromise settlement of the claim asserted against the underwriters was agreed upon on August 2, 1943 and consummated. Under the compromise settlement the underwriters paid to American Dredging Company,

as requested by all the other named assureds, the sum of $450,000.00, and received from the assureds a complete release of all claims under the policies, an agreement that all hull policies were terminated as of April 2, 1943, and a surrender and cancellation of the policies.

The underwriters did not take or acquire title to, or any interest in, the said Dredger Marshall C. Harris, in connection with or as a result of the above-mentioned compromise settlement.

H. W. BROWNE

Subscribed and sworn to before me this 20th day of June, 1949

EVA L. NELSON
NOTARY PUBLIC In and For the City and County of San Francisco, State of California.

My Commission Expires October 3, 1952.

E. G. TAGGART

Subscribed and sworn to before me this 20th day of June, 1949

EVA L. NELSON
NOTARY PUBLIC In and For the City and County of San Francisco, State of California.

My Commission Expires October 3, 1952.

WILLIAM V. HALL

Subscribed and sworn to before me this 20th day of June, 1949

EVA L. NELSON
NOTARY PUBLIC In and For the City and County of San Francisco, State of California.

My Commission Expires October 3, 1952.

24 Filed Apr 5 1950 Harry M. Hull, Clerk

Exhibit 5

COPY

UNITED STATES MARITIME COMMISSION

AIR MAIL
REGISTERED July 1, 1949
American Dredging Company
Route 1, P. O. Box 562
Pittsburg, California.

Subject: Dredge MARSHALL C. HARRIS (YM-25)

Gentlemen:

The status of the MARSHALL C. HARRIS has not as yet been fully determined in so far as Public Law 305, 78th Congress, is concerned. In the meantime, however, you are requested to advise us by return mail whether you continue to be interested in acquiring the dredge.

If you are NOT interested in acquiring the dredge, please notify us by return mail, sending a copy of your letter to Mr. L. C. Fleming, Pacific Coast Director, U. S. Maritime Commission, 180 New Montgomery Street, San Francisco, California.

If you are interested in acquiring the dredge, you are requested to contact Mr. Fleming at the address shown. Mr. Fleming will arrange to have a surveyor meet your representative at Long Beach, for the purpose of conducting a joint inspection, after which you are requested to advise us as to the amount you would be willing to pay the Government to acquire title to the dredge.

This letter is not to be construed as a notification that the MARSHALL C. HARRIS is available for return to you under the provisions of Public Law 305, 78th Congress. Pending final determination of the status of the dredge in relation to Public Law 305, no such notification can be issued. However, if you are interested in acquiring the dredge, to have a survey made now will facilitate mat-

ters in the event it is determined that the dredge is subject to the provisions of Public Law 305.

Very truly yours,
/s/ J. L. Pimper
J. L. PIMPER
Chief
Division of Vessel Disposal.

25 Filed Apr 5 1950 Harry M. Hull, Clerk

Exhibit 6

COPY

AMERICAN DREDGING COMPANY

July 8, 1949

J. L. Pimper, Chief
Division of Vessel Disposal
United States Maritime Commission
Washington, D. C.

Re: Dredge MARSHALL C. HARRIS
(YM-25)

Dear Sir:

In answer to your letter of July 1, 1949, we again confirm that we are definitely interested in acquiring the dredge Marshall C. Harris.

Harry Gast, 10541 Blythe Avenue, Los Angeles, California (telephone Vermont 8-4385) will represent us in the joint inspection of the dredge at Long Beach with your surveyor.

We are forwarding a copy of this letetr to Mr. L. C. Fleming, Pacific Coast Director, United States Maritime Commission, 180 New Montgomery Street, San Francisco, California.

We will contact Mr. Fleming immediately.

Very truly yours,
AMERICAN DREDGING COMPANY
By RUSSELL S. HARRIS
Vice-President.

RSH:mh

26 Filed Apr 5 1950 Harry M. Hull, Clerk

Exhibit 7

AIR MAIL DEC 22 1949

American Dredging Company
Route 1, P. O. Box 562
Pittsburg, California

Gentlemen:

Subject: MARSHALL C. HARRIS (Dredge)
Navy designation: YM-25
Location:
Long Beach, Calif.

This letter has reference to previous correspondence with you relative to the Dredge MARSHALL C. HARRIS, and to numerous conferences attended by your attorneys, the Chief of our Division of Vessel Disposal, the Solicitor of our Bureau of Law and members of his staff, concerning the status of the dredge. The conferences were for the purpose of discussing whether or not the MARSHALL C. HARRIS, which you owned at the time she was sunk in Pearl Harbor on or about April 2, 1943, under the circumstances of her subsequent acquisition and rehabilitation by the Navy, came within the purview of Public Law 305, 78th Congress.

The Solicitor of our Bureau of Law has now advised that after a thorough study of all the documents and data which were submitted relating to the MARSHALL C. HARRIS from the time of her charter by you on June 7, 1941, to "Contractors," Pacific Naval Air Bases, until her acquisition by the Navy following her sinking on or about April 2, 1943, in Pearl Harbor, and her subsequent rehabilitation by that Department, he is of the opinion that the provisions of Public Law 305 do not apply to this vessel and that you are not therefore entitled to reacquire the vessel under its provisions.

The Department of the Navy has been notified that the MARSHALL C. HARRIS does not come within the pur-

view of Public Law 305, 78th Congress, and that any further action with regard to the vessel will be the responsibility of that Department. Our letter included a request that in the event it is decided to offer the dredge for sale to the public, that a notification be sent to you.

Very truly yours,
(Signed) Wm. U. Kirsch
for (Stamped) Charles D. Marshall
Charles D. Marshall
General Manager

Copy to—
Hudson, Creyke, Kirks & Lipscomb
444 Washington Building
Washington 5, D. C.

27 Filed Apr 5 1950 Harry M. Hull, Clerk

Exhibit 8

January 16, 1950

Mr. Charles D. Marshall
General Manager
U. S. Maritime Commission
Washington 25, D. C.

Re: Marshall C. Harris (Dredge), Navy designation: YM-25; location: Long Beach, California.

Dear Sir:

As attorneys for the American Dredging Company, we are writing to protest your decision of December 22, 1949, ruling that the provisions of Public Law 305, 78th Congress, do not apply to the disposition of the Marshall C. Harris and indicating that cognizance of the dredge is being transferred back to the Navy Department. We hereby request reconsideration of this decision.

We are informed that the primary basis of the decision of the Soliictor of your Bureau of Law was the fact that the sale of the dredge Marshall C. Harris to the United States Government occurred after the dredge was sunk and before it had been salvaged. We have definite proof

the determination that salvage operations should proceed under the terms of the insurance policies.

3. The Navy proceeded as above.

4. In the final agreement with the Navy and the Underwriters the cost of salvage was a definite consideration.

5. To the best of my knowledge and belief the salvage of the dredge "Marshall C. Harris" was nearing completion before the final terms of the agreement dated September 10, 1943, between the Navy, the Underwriters, and the American Dredging Co., were agreed upon.

January 28, 1950

/s/ Russell S. Harris

Oakland, California
Subscribed and sworn to before me this
30th day of January, 1950.
/s/ E. Mellencamp (SEAL)
Notary Public in and for the
County of Alameda, State of California
Commission Expires Sept. 12, 1952.

30 Filed Apr 5 1950 Harry M. Hull, Clerk

Exhibit 11

UNITED STATES MARITIME COMMISSION
WASHINGTON

Mar 2 1950

Minor Hudson, Esq.
Hudson, Creyke & Lipscomb
444 Washington Building
Washington 5, D. C.
Dear Mr. Hudson:

Subject: MARSHALL C. HARRIS
Navy designation: YM-25
Location: Long Beach, Calif.
Re: American Dredging Company
Pittsburg, California

This is to advise you that subsequent to the receipt of your letter of January 31, 1950, we have been in com-

munication with the Department of the Navy with a view to obtaining any additional data which might have bearing on the status of the MARSHALL C. HARRIS, including the information which you stated in your letter was on file with the Bureau of Yards and Docks.

The case has been reviewed by our Bureau of Law with careful consideration given to the additional information that was obtained from the Navy. It has now advised us that the additional information which was obtained from the Department of the Navy relative to the case included no facts which would justify the conclusion that the dredge is subject to the provisions of Public Law 305, 78th Congress. Under the circumstances the notification to this effect which was sent to your client, American Dredging Company, under date of December 22, 1949, is confirmed. A copy of the notification to the American Dredging Company was sent to you by letter of the same date.

The Department of Navy has been notified that the MARSHALL C. HARRIS is not subject to the provisions of Public Law 305, 78th Congress. Our notification included the request that in the event the dredge is offered for sale to the public, the announcement of her availability be sent to the American Dredging Company.

Sincerely yours,
/s/ Charles D. Marshall
Charles D. Marshall
General Manager

31 Filed Apr 5 1950 Harry M. Hull, Clerk

Exhibit 12

[Public Law 305 - 78th Congress]
[Chapter 199 - 2d Session]
[H. R. 3261]

AN ACT

To amend the Act of April 29, 1943, to authorize the return to private ownership of Great Lakes vessels and ves-

sels of one thousand gross tons or less and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to authorize the return to private ownership of certain vessels formerly used or suitable for use in the fisheries or industries related thereto", approved April 29, 1943 (Public Law 44, Seventy-eighth Congress; 57 Stat. 69), is amended to read as follows: "That any vessel formerly used or suitable for use in the fisheries or industries related thereto, any vessel of one thousand gross tons (determined in accordance with the provisions of section 77 of title 46 of the United States Code) or less, and any vessel employed on the Great Lakes during the year preceding its acquisition by the United States, the title to which has been or may hereafter be acquired by the United States through purchase or requisition except any vessel seventeen years of age or older traded in under the provisions of section 510, Merchant Marine Act, 1936, as amended, or any other provision of law may be returned to private ownership in accordance with the provisions of this Act.

"Sec. 2. Every such vessel shall, upon determination by the department or agency having possession thereof that the vessel is no longer needed or can be spared by such department or agency without detriment to its service, be made available to the Administrator of the War Shipping Administration (hereinafter referred to as the Administrator), who shall notify the owner from whom such vessel was purchased or requisitioned that the vessel may be returned to such owner upon repayment to the United States of the compensation paid therefor less such allowances as the Administrator may deem reasonable (1) to cover the cost of such reconditioning as the Administrator after consultation with the owner deems necessary to restore the vessel to condition and utility at least as good as when acquired by the United States (ordinary wear and

tear excepted), and (2) to compensate such owner for the use of the vessel by the United States, and upon compliance with such other terms and conditions as the Administrator may prescribe. The determination of such allowances by the Administrator shall be final notwithstanding any other provision of law.

"Sec. 3. If any such owner to whom compensation has been paid or a tender of compensation has been made shall fail, within a reasonable time after notice (which time shall be specified in the notice but may be extended by the Administrator) to make arrangements satisfactory to the Administrator for such return of the vessel or shall expressly waive the right thereto, the Administrator may advertise the vessel for sale upon competitive sealed bids subject to such terms and conditions as the Administrator may prescribe, including in the case of any vessel used in the commercial fisheries or industries related thereto immediately prior to the acquisition of such vessel by the United States, a requirement that the vessel will not be used for a period of two years from date of sale, other than in the commercial fisheries or industries related thereto: *Provided, however,* That the Administrator may reject any bid which does not equal the purchase price or compensation paid or payable by the United States for such vessel less a reasonable allowance to cover the cost of reconditioning as hereinabove defined.

"Sec. 4. The Administrator may withhold from the funds received for the return or sale of any such vessel the expenses incurred by him in such return or sale, and shall pay over the baalnce of such receipts to the department or agency by which such vessel was made available."

Approved May 18, 1944.

* * * *

32 Filed Apr 5 1950 Harry M. Hull, Clerk

Motion for Preliminary Injunction

Plaintiff, American Dredging Company, moves the Court for a preliminary injunction in the above cause, enjoining the defendants and each of them, their agents, servants and employees, attorneys and all persons in active concert or participation with them, pending the final hearing and determination of this cause, from disposing of, selling, scrapping or divesting the United States from title of the dredger barge MARSHALL C. HARRIS. For grounds, plaintiff says:

1. Unless restrained, the defendant Francis P. Matthews will advertise and/or otherwise proceed with and make a sale of the vessel MARSHALL C. HARRIS.

2. Immediate, permanent and irreparable injury, loss and damage will result to plaintiff by reason of plaintiff's being denied the right to reacquire the said vessel under the provisions of Public Law 305, 78th Congress, as more particularly set out in the complaint filed herein.

3. If defendant Francis P. Matthews or any other branch or agency of the Government disposes of the said vessel or divests title thereof from the United States, any judgment which this court may later render or final determination of this cause will be ineffective.

4. If this preliminary injunction be granted, the injury, if any, to defendants herein, if final judgment be in their favor, will be inconsiderable and will be adequately indemnified by bond.

HUDSON, CREYKE & LIPSCOMB
By /s/ Geoffrey Creyke, Jr.
Geoffrey Creyke, Jr.
Attorneys for Plaintiff
444 Washington Building

• • • •

33 Filed Apr 11 1950 Harry M. Hull, Clerk

Motion to Dismiss

Come now the defendants and by their attorney, the United States Attorney, move this Honorable Court to dismiss the complaint, hereinbefore filed, for the reason that this Court is without jurisdiction over the subject matter.

/s/ George Morris Fay
GEORGE MORRIS FAY
United States Attorney
/s/ Ross O'Donoghue
ROSS O'DONOGHUE
Assistant United States
Attorney

• • • •

34 Filed May 16 1950 Harry M. Hull, Clerk

Order

This case having come on to be heard upon defendants' Motion to Dismiss and it appearing to the Court that this is in fact a suit against the United States, which has not consented to be sued, it is by the Court this 16th day of May, 1950,

ORDERED that the complaint be and it is hereby dismissed.

/s/ Edward M. Curran
Judge

• • • •

35 Filed Jun 8 1950 Harry M. Hull, Clerk

Notice of Appeal
To the United States Court of Appeals
for the District of Columbia Circuit

Notice is hereby given that American Dredging Company, a corporation, plaintiff above named, hereby appeals

to the United States Court of Appeals for the District of Columbia Circuit from the order dismissing its complaint filed herein, entered in this action on the 16th day of May, 1950.

HUDSON, CREYKE & LIPSCOMB
/s/ Geoffrey Creyke, Jr.
Geoffrey Creyke, Jr.
Attorneys for Appellant American Dredging Company
444 Washington Building
Washington, D. C.

• • • •

Mr. Goldstein 12-8-50

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,723

AMERICAN DREDGING COMPANY, APPELLANT

v.

~~MAJOR GENERAL PHILIP B. FLEMING~~ Vice Admiral Edward L. Cochrane, INDIVIDUALLY AND AS CHAIRMAN OF THE ~~UNITED STATES~~ Federal MARITIME ~~COMMISSION~~ Board ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

GEORGE MORRIS FAY,
United States Attorney,
ROSS O'DONOGHUE,
Assistant United States Attorney.

United States Court of Appeals
For the
District of Columbia Circuit

FILED OCT 2 1950

Joseph W. Stewart

CLERK

No. 10,723

QUESTION PRESENTED

Whether a suit may be maintained to compel Government officials to convey a naval vessel to a party, as allegedly required by law, when title to and possession of the vessel is concededly in the United States, which has not been made a party and which has not consented to be sued.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,723

AMERICAN DREDGING COMPANY, APPELLANT

v.

MAJOR GENERAL PHILIP B. FLEMING, INDIVIDUALLY AND AS CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

This is a suit against certain persons who formerly constituted the United States Maritime Commission to compel them to turn over to appellants a dredger barge known as the "Marshall C. Harris." (9 A) The Secretary of the Navy is also named a defendant to restrain him from transferring the vessel while the suit is pending. (3 A) While this barge was being operated under a charter from the owner, the appellant here, to a group in a joint venture performing work under contract with the United States Navy, it was sunk on April 2, 1943 in Honolulu harbor. (4 A) The barge was insured against marine risks in the amount of $600,000 and after sinking, the appellant tendered an abandonment of the vessel to the underwriters. (5 A)

This offer was not immediately acted upon but considerable negotiations followed. (5 A, 24 A) The hulk was a menace to navigation in one of the most important harbors in the Pacific at a time when a full-scale naval war was being waged by the United States. (4 A) The Navy, without waiting for the outcome of the negotiations undertook to raise the vessel and to tow it to dry dock. (5 A) The negotiations ultimately resulted in an agreement between appellant and the underwriters under which appellants paid $450,000 in full settlement of all claims and the appellant agreed to convey title to the United States of America (16 A ff.) The United States was not a party to this agreement. (20-21 A).

Pursuant to this agreement, the appellant executed a "Bill of Sale" to the United States, conveying title to the United States, and agreeing to warrant and defend the title to said vessel and the consideration recited therefor was the nominal sum of $10.00. (23-24 A) The Navy subsequently purchased from appellant the auxiliary plant and equipment for $90,000. (5 A) The vessel was refloated, rebuilt, and reconditioned by the Navy at considerable cost. (5 A) It was then towed to Guam where it was used until the end of 1948. (5-6 A) It was declared surplus by the Navy Department in April, 1949 and was turned over to the U. S. Maritime Commission for disposition. (6 A) The appellant represented to the Maritime Commission and maintained in this suit that the vessel should be returned to it under the provisions of Public Law 305 of the 78th Congress, which provides in effect that vessels of less than a thousand gross tons "acquired by the United States through purchase or requisition upon a determination that it is surplus may be returned to the former owner upon repayment to the United States of the compensation paid therefor less such amount as may be necessary to restore the vessel to a condition at least as good as when acquired by the United States and to compensate the owner for the use of the vessel by the United States." (33-35 A) Thus, appellant, which has already been fully compensated for the loss of said vessel by the insurance underwriters, now seeks to reacquire it

from the United States upon the payment of $10.00, to receive also the cost of reconditioning it and to receive, in addition, compensation for its use while the Navy was refloating, rebuilding, and using it.

SUMMARY OF ARGUMENT

The complaint seeks to compel officers of the United States Maritime Commission to return to the appellant a vessel formerly belonging to it, which now belongs to and is in the possession of the United States pursuant to a conveyance by the appellant to the United States. The suit thus seeks to compel Government agents to dispose of Government property. It is, therefore, a suit against the United States without its consent and was properly dismissed by the District Court.

ARGUMENT

This suit involves property of the United States, although it is not made a party. Therefore, it is a suit against the United States to which it has not consented. There is no question but that the dredger barge "The Marshall C. Harris" is the property of the United States of America. The appellant recognized this in its complaint, as for example, in Paragraph 17 thereof where it states that on "September 10, 1943, . . . the United States accepted a transfer of ownership with general warranty of title from American Dredging Company." (8 A) Annexed to the complaint as Exhibit 3 is a so-called bill of sale from the American Dredging Company, to which is affixed its corporate seal and which is signed by the vice-president and assistant secretary of the corporation, whereby title is conveyed to the United States by the following words of conveyance:

> "To Have and to Hold the said American dredger barge 'Marshall C. Harris' and appurtenance thereunto belonging unto the said United States of America to the sole and only proper use, benefit, and behoof of the said United States of America forever: and it, the said American Dredging Company, a corporation, has promised, covenant, and agree, to and with the said United States of America to warrant and defend the title to said American dredger barge 'Marshall C.

> Harris', 'as is' and 'where is' and all the other beforementioned appurtenances against all and every person and persons whomsoever." (23-24A).

The suit filed in the District Court asks that the defendants "be ordered, compelled and required . . . to return to this plaintiff under the terms of said law the said vessel MARSHALL C. HARRIS." (9 A) This is the prayer for relief and not as suggested in appellant's brief:

> "There is no endeavor here to deprive the sovereign behind its back of its property by proceeding against its agents, as has been argued in many of the other cases. Appellant asks for no property; it asks only for a notice." (Br. 14).

Manifestly, appellant asked the Court to compel appellees to turn over to it property of the United States without naming the United States as a defendant. This suit is thus a classic example of a suit against the United States to which it has not consented. It is less complicated than almost any other such suit that has been decided by the Supreme Court. It is considerably less complicated and difficult than the most important recent case on this subjejct, which immediately suggests itself when a question of the present kind is raised, namely, *Larson* v. *Domestic and Foreign Commerce Corporation,* 337 U. S. 682. That was a suit to compel the War Assets Administrator to deliver to the plaintiff certain coal which was being disposed of as surplus. The complaint alleged, and this Court attached considerable importance to the allegation, that title had passed from the United States to the plaintiff. *Domestic and Foreign Commerce Corporation* v. *Littlejohn,* 83 U. S. App. D. C. 13, 165 F. 2d 235. Therefore, this Court adopted the view that the complaint stated a good cause of action because it alleged that property of the plaintiff was being interfered with by agents of the United States without authority and unconstitutionally. There can be no doubt that if the complaint had admitted the title to the property was in the United States, this Court would have had no hesitation in holding that it was a suit against the sovereign.

The Supreme Court went further than this Court was willing to go and held that even where it was contended that title to property was in the plaintiff, the suit might, nevertheless, be one against the United States. Throughout the opinion of Mr. Chief Justice Vinson, it is apparent that any suit affecting property of the United States is a suit against it. For example, at page 688, the Court remarked:

> "In each such case the question is directly posed as to whether, by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign. For the sovereign can act only through agents and, when an agent's actions are restrained, the sovereign itself may, through him, be restrained. * * * It arises whenever suit is brought against an officer of the sovereign in which the relief sought from him is not compensation for an alleged wrong but, rather, the prevention or discontinuance, *in rem*, of the wrong. In each such case the compulsion, which the court is asked to impose, may be compulsion against the sovereign, although nominally directed against the individual officer. If it is, then the suit is barred, not because it is a suit against an officer of the Government, but because it is, in substance, a suit against the Government over which the court, in the absence of consent, has no jurisdiction."

And again in Footnote 11 on page 691:

> "Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. *North Carolina* v. *Temple*, 134 U. S. 22 (1890)."

This is very much the case here, for although the complaint alleges that appellees have acted beyond their statutory powers, what it seeks is "the disposition of unquestionably sovereign property." The Court in the *Larson* case reviewed all the pertinent Supreme Court cases on the sub-

ject, including the one most nearly identical with the instant case, *Goldberg* v. *Daniels,* 231 U. S. 218, (1913). Mr. Chief Justice Vinson summarized that case as follows at page 700:

> "Opposed to the rationale of the *Goltra* opinion is the decision, by Mr. Justice Holmes, in *Goldberg* v. *Daniels,* 231 U. S. 218 (1913). There as here, the question concerned the effect of a claimed sale of Government surplus property. The plaintiff submitted a sealed bid for a surplus war vessel, accompanied in that case by a certified check as payment in advance. When the bids were opened his was the highest. The Secretary of the Navy, however, determined not to accept the bid and refused to deliver the vessel. The plaintiff brought mandamus. He alleged that the sale was complete when the bids were opened and that the ownership of the vessel was therefore in him, and he asked that the Secretary be compelled to deliver it. The lower courts examined the details of the transaction and concluded that the sale was not complete until the Secretary announced his acceptance of the bid. On appeal here, it was expressly held that it was not necessary to decide whether the lower courts were correct. The suit must fail as one against the United States, the Court said, whether or not the sale was complete. In so holding the Court said, in effect, that the question of title was immaterial to the court's jurisdiction. Wrongful the Secretary's conduct might be, but a suit to relieve the wrong by obtaining the vessel would interfere with the sovereign behind its back and hence must fail."

The Supreme Court reviewed as well the case of *Goltra* v. *Weeks,* 271 U. S. 536 (1926). That case might give appellants here some consolation for it is in apparent disagreement with the principle urged by the appellees here; that whenever a suit would affect property of the United States, it is a suit against the United States. For there, the Supreme Court held that an attempt by certain officers to recover some barges that were the property of the United States, as they believed they were entitled to do under the lease, was illegal and the officers were restrained from taking such action. For this reason, appellant quotes extensively from *Goltra* v. *Weeks* at pages 7 and 9 of its brief, apparently overlooking the fact that in the *Larson* case, the

Supreme Court decisively rejected the doctrine of that case and adopted that of the *Goldberg* case, saying at page 701:

> "Since we must therefore resolve the conflict in doctrine we adhere to the rule applied in the *Goldberg* case and to the principle which has been frequently repeated by this Court, both before and after the *Goltra* case * * *."

Appellant relies also on *Land* v. *Dollar,* 330 U. S. 731 (1947), but even the language quoted (Br. 7) makes it clear that where title is unquestionably in the United States, the suit may not be maintained. Appellant quotes language of the Supreme Court from page 738 which includes the statement that: "If ownership of the shares is in the United States, suit to recover them would of course be a suit against the United States."

The case of *Philadelphia Company* v. *Stimson,* 223 U. S. 605, on which appellant relies, also makes it clear that were the suit is one involving property of the United States rather than the property of the plaintiff, the suit could not be maintained. This was pointed out by the Court in the *Larson* case in its quotatoin from the *Stimson* case in Footnote 23 on page 700, saying:

> "The Court in the *Stimson* case said, 223 U. S. at page 622: '*While the complainant's title lay at the foundation of the suit, and it would be necessary for the complainant to prove it, if denied,* still if its title to the lands under water were established or admitted to be as alleged, the question would remain whether the defendant in imposing restrictions upon the use of the property was acting by virtue of authority validly conferred by a general act of Congress. This was the principal question which the complainant sought to have determined.' " (Emphasis Supplied).

Although Mr. Justice Frankfurter dissented in the *Larson* case, (in which dissent he was joined by Mr. Justice Jackson) it is clear that the dissent is predicated on other grounds. Justice Frankfurter said at page 725:

> "Of course where the United States is the owner in possession of property a court cannot interfere without the Government's consent."

In an appendix to his opinion, Justice Frankfurter tabulates the cases involving the question of sovereign immunity under various headings. Among those "Cases In Which Jurisdiction Was Found Wanting" were cases where:

> "Plaintiff sought interest in property which concededly belonged to the Government, or demanded relief calling for an assertion of what was unquestionably official authority.
>
> "*Governor of Georgia* v. *Madrazo*, 1 Pet. 110 (1828); *Louisiana* v. *Jumel*, 107 U. S. 711; *Cunningham* v. *Macon & Brunswick R. Co.*, 109 U. S. 446; *Hagood* v. *Southern*, 117 U. S. 52; *Christian* v. *Atlantic & N. C. R. Co.*, 133 U. S. 233; *North Carolina* v. *Temple*, 134 U. S. 22; *New York Guaranty & Indemnity Co.* v. *Steele*, 134 U. S. 230; *Belknap* v. *Schild*, 161 U. S. 10; *Oregon* v. *Hitchcock*, 202 U. S. 60; *Louisiana* v. *Garfield*, 211 U. S. 70; *Murray* v. *Wilson Co.*, 213 U. S. 151; *Hopkins* v. *Clemson Agricultural College*, 221 U. S. 636; *Goldberg* v. *Daniels*, 231 U. S. 218; *Louisiana* v. *McAdoo*, 234 U. S. 627; *Lankford* v. *Platte Iron Works*, 235 U. S. 461; *Wells* v. *Roper*, 246 U. S. 335; *Morrison* v. *Work*, 266 U. S. 481; *Minnesota* v. *United States*, 305 U. S. 382."

No single case is mentioned by Justice Frankfurter in his learned tabulation where title was in the United States which was not held to be a suit against the United States. An examination of each of the cases cited by Justice Frankfurter shows that wherever the plaintiffs sought an interest in property which belonged to the United States, the Supreme Court determined that there was no jurisdiction to entertain such a suit since it was against the sovereign without its consent.

CONCLUSION

Since the complaint itself recognizes that the property which it seeks to compel agents of the Government to turn over to it is the property of the United States, this is a suit against the sovereign without its consent and the Court below properly dismissed it for want of jurisdiction.

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